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FAKHRURRAZI HASAN v. PP

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)

ABDULL HAMID EMBONG FCJ

SURIYADI HALIM OMAR FCJ

B

AHMAD MAAROP FCJ

MOHAMED APANDI ALI FCJ

[CRIMINAL APPEAL NO: 05-289-12-2012(B)]

16 NOVEMBER 2015

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CRIMINAL LAW: *Dangerous drugs – Trafficking in cannabis – Proscribed drugs in bag carried by accused – Knowledge – Inference of knowledge – Conduct of accused – Whether forming basis for inference of knowledge – No finding made whether conduct relied on by prosecution was proven or had nexus with drugs – Whether conviction for trafficking unsustainable – Whether only guilty of possession – Sentence – Consideration of Parlan Dadeh v. PP*

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The appellant was convicted of an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA') and sentenced to death when a paper bag he was carrying while walking alone in the town of Rawang, was found to have contained three packets of cannabis weighing 2,681g (underneath a folded towel and wrapped with newspaper). It was not in dispute that to prove knowledge of the drugs, the prosecution was relying on the conduct of the appellant, including that of his looking shocked and attempting to run away. This said, in finding a *prima facie* case against the appellant on the basis of presumed trafficking under s. 37(da) of the DDA, and calling for the defence, the trial judge ruled that there was sufficient evidence to infer that the appellant had *mens rea* knowledge of the drugs, since he had every opportunity to inspect the packets in the bag and 'little effort was required to lift the towel and unwrap the newspaper wrapping to uncover the drugs'. The trial judge had also rejected the appellant's defence, which was that the police had retrieved the bag from a car, in which he was a passenger, and that he was not aware of the presence of the bag or the cannabis found therein.

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In this appeal against the decision of the Court of Appeal affirming the conviction and sentence, the appellant essentially argued that this was a fit and proper case for an offence of possession under s. 6 of the DDA read with s. 39A(2) thereof. It was contended that the trial judge had misdirected herself when she failed to consider whether the facts had only supported passive possession, and not presumed trafficking. The issue that arose for determination were: (i) whether the appellant could be said to have had knowledge of the drugs in the bag in question; and (ii) in any case, whether the conviction for trafficking herein was sustainable on the facts and in law.

**Held (allowing appeal; convicting appellant for offence of possession and sentencing him to 20 years' imprisonment and ten strokes of whipping)
Per Ahmad Maarop FCJ delivering the judgment of the court:**

- (1) Before the presumption of trafficking under s. 37(da) can be invoked, the trial judge must make an affirmative finding of possession based on the evidence. In that, she cannot make use of s. 37(d) of the DDA. (para 10) A
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- (2) The trial judge had no difficulty in finding that the appellant had custody and control of the three packets of proscribed drugs. However, mere custody and control is not sufficient to prove possession. The appellant must be proven to have knowledge of the drugs. (para 10) C
- (3) Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge. (para 11) D
- (4) Evidence of conduct may be material evidence from which inference of knowledge can be made by the court. The law relating to conduct which is admissible under s. 8 of the Evidence Act 1950 was explained at length by this court in *Parlan Dadeh v. PP*. (para 13) E
- (5) It is essential for the trial judge to come to a finding whether the conduct relied upon to establish knowledge is influenced by or is relevant to a fact in issue under s. 8 of the Evidence Act as explained in *Parlan Dadeh*. The trial judge must be convinced that the evidence adduced by the prosecution had established a nexus between the conduct of the appellant and the three packets of drugs in his custody and control. She also must, before that, make a finding whether the conduct relied upon by the prosecution (of looking shocked and attempting to run away) had been proven to her satisfaction. (para 16) F
- (5a) There was nothing to show that the trial judge had dealt with the evidence of the conduct relied upon by the prosecution in the way explained. Apparently, she was not satisfied that the evidence of conduct had led to the inevitable inference of guilty knowledge on the part of the appellant. Hence, the appellant was correct in contending that the trial judge had discounted the evidence of conduct of looking shocked and attempting to run away. (para 16) G
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- (6) Accessibility and opportunity to inspect the drugs alone is insufficient to inevitably lead to the inference of knowledge. Here, since the evidence of conduct had been ruled out by the trial judge, there was insufficient factual matrix for her to make the inference of knowledge on the part of the appellant. On the proven facts, the prosecution had only proven that the appellant had custody and control of the bag and I

- A package containing the proscribed drugs, thereby activating the presumption of possession and knowledge of the nature of the dangerous drugs under s. 37(d) of the DDA. (para 16)
- (6a) Since s. 37(d) of the DDA had been invoked, s. 37(da) could no longer be relied upon to prove trafficking. It follows that the trial judge could only have called upon the appellant to enter his defence under s. 6 read with s. 39A(2) of the DDA. (para 16)
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- (6b) The appellant had not on the balance of probability rebutted the presumption of possession and therefore stood convicted of an offence under s. 6 of the DDA punishable under s. 39A(2) thereof. Considering the mitigation and the submissions of the parties, the court would sentence the appellant to imprisonment for a term of 20 years and ten strokes of whipping. (para 17)
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Bahasa Malaysia Headnotes

- D Perayu telah disabit dengan kesalahan di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB') dan dijatuhkan hukuman mati apabila beg kertas yang dibimbitnya semasa berjalan berseorangan di bandar Rawang, didapati mengandungi tiga paket ganja seberat 2,681g (di bawah lipatan tuala dan dibungkus dengan surat khabar). Tidak dinafikan bahawa bagi membuktikan pengetahuan mengenai dadah, pendakwaan antara lain bergantung kepada tatalaku dan kelakuan perayu, terutama keadaannya yang terkejut dan percubaannya untuk melarikan diri. Selain itu, dalam mendapati wujudnya kes *prima facie* terhadap perayu atas dasar pengedaran diandaikan di bawah s. 37(da) ADB, dan memanggil pembelaan, hakim bicara memutuskan bahawa terdapat keterangan mencukupi untuk membuat andaian bahawa perayu mempunyai pengetahuan *mens rea* mengenai kandungan beg, memandangkan 'beliau mempunyai segala peluang untuk memeriksa paket-paket dadah dalam beg dan untuk melihat dadah beliau hanya perlu mengangkat tuala dan membuka kertas penggulungnya'. Hakim bicara juga menolak pembelaan perayu, bahawa beg sebenarnya dijumpai oleh pihak polis di dalam sebuah kereta, di mana perayu adalah penumpangnya, dan bahawa perayu tidak tahu mengenai kehadiran beg mahupun ganja yang terdapat di dalamnya.
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- H Dalam rayuannya terhadap keputusan Mahkamah Rayuan yang mengesahkan sabitan dan hukuman, perayu secara intinya menghujahkan bahawa ini adalah satu kes wajar dan sesuai untuk kesalahan milikan di bawah s. 6 ADB dibaca bersama s. 39A(2) di situ. Dihujahkan bahawa hakim bicara telah melakukan salah-arahan kerana gagal menimbang sama ada fakta-fakta hanya menunjuk kepada milikan pasif, dan bukan pengedaran diandaikan. Isu yang berbangkit untuk pertimbangan mahkamah adalah (i) sama ada perayu boleh dikatakan mempunyai pengetahuan mengenai dadah dalam beg; dan
- I (ii) walau apapun sama ada dapatan bersalah kerana mengedar seperti yang diputuskan oleh hakim bicara boleh dipertahankan di sisi undang-undang dan fakta.

**Diputuskan (membenarkan rayuan; mensabitkan perayu atas kesalahan milikan dan menjatuhkan hukuman 20 tahun penjara dan 10 sebatan)
Oleh Ahmad Maarop HMP menyampaikan penghakiman mahkamah:**

- (1) Sebelum andaian pengedaran di bawah s. 37(da) boleh dipakai, hakim bicara mestilah membuat dapatan afirmatif mengenai milikan berasaskan keterangan. Dalam berbuat demikian, hakim bicara tidak boleh menggunakan s. 37(da) ADB. A
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- (2) Hakim bicara tiada masalah mendapati bahawa perayu mempunyai jagaan dan kawalan ketiga-tiga paket dadah terlarang. Namun, jagaan dan kawalan semata-mata tidak mencukupi untuk membuktikan milikan. Perayu hendaklah dibuktikan mempunyai pengetahuan mengenai dadah. C
- (3) Seringkali, bukti mengenai pengetahuan adalah soal membuat andaian. Fakta berdasarkan mana andaian pengetahuan dibuat adalah berbeza dari satu kes ke satu kes lain. Adalah memadai jika pendakwaan membuktikan fakta-fakta di mana andaian boleh dibuat dengan teratur bahawa tertuduh mempunyai pengetahuan. D
- (4) Keterangan tatalaku mungkin menjadi keterangan material di mana andaian pengetahuan boleh dibuat oleh mahkamah. Undang-undang mengenai tatalaku yang boleh diterima-masuk di bawah s. 8 Akta Keterangan 1950 telah diperjelas dengan panjang lebar oleh mahkamah ini dalam *Parlan Dadeh v. PP*. E
- (5) Adalah penting bagi hakim bicara untuk membuat dapatan sama ada tatalaku yang menjadi sandaran bagi membuktikan pengetahuan relevan kepada atau dipengaruhi oleh sesuatu fakta dalam isu di bawah s. 8 Akta Keterangan seperti yang dijelaskan dalam *Parlan Dadeh*. Hakim bicara hendaklah yakin bahawa keterangan seperti yang dikemukakan oleh pendakwaan menunjukkan kaitan antara tatalaku perayu dengan tiga paket dadah yang berada dalam jagaan dan kawalannya. Hakim bicara hendaklah juga, sebelum itu, membuat dapatan bahawa tatalaku yang bergantung oleh pendakwaan (perayu kelihatan terkejut besar dan cuba melarikan diri) telah dibukti ke tahap yang memuaskan hatinya. F
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- (5a) Tiada apapun yang menunjukkan bahawa hakim bicara telah menangani keterangan tatalaku yang menjadi sandaran pendakwaan dengan cara seperti yang diperjelaskan. Hakim bicara kelihatannya tidak berpuas hati bahawa keterangan tatalaku telah membangkitkan andaian tidak dapat tidak mengenai pengetahuan di pihak perayu. Oleh itu, perayu betul dalam pengataannya bahawa yang arif hakim telah tidak mengambil kira keterangan tatalaku perayu yang terkejut besar dan cuba melarikan diri. H
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- A (6) Akses kepada dadah dan peluang untuk memeriksanya semata-mata tidak mencukupi untuk membawa kepada andaian pengetahuan tidak dapat tidak. Di sini, oleh kerana keterangan tatalaku telah disisihkan oleh hakim bicara, maka tidak wujud gagasan fakta yang mencukupi bagi membolehkan hakim bicara membuat andaian pengetahuan ke atas perayu. Berdasarkan fakta-fakta yang terbukti, pendakwa hanya menunjukkan bahawa perayu mempunyai jagaan dan kawalan ke atas beg dan pakej mengandungi dadah terlarang, sekaligus membingkas andaian milikan dadah berbahaya di bawah s. 37(d) ADB.
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- C (6a) Oleh kerana s. 37(d) ADB telah pun dipakai, maka s. 37(da) tidak lagi boleh digunakan untuk membuktikan pengedaran. Ianya mengikut bahawa hakim bicara hanya boleh memanggil perayu untuk membela diri di bawah s. 6 dibaca bersama-sama dengan s. 39A(2) ADB.
- D (6b) Perayu gagal menyangkal andaian milikan atas imbalan kebarangkalian dan oleh itu tersabit melakukan kesalahan di bawah s. 6 ADB yang boleh dihukum di bawah s. 39A(2) Akta. Mengambil kira mitigasi serta hujah kedua-dua pihak, mahkamah menjatuhkan hukuman 20 tahun penjara dan sepuluh sebatan rotan ke atas perayu.

Case(s) referred to:

- E *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 SC (*refd*)
DPP v. Brooks [1974] 2 All ER 840 (*refd*)
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC (*refd*)
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC (*refd*)
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC (*refd*)
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC (*refd*)
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC (*refd*)

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Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)
 Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A(2), 39B(2)
 Evidence Act 1950, s. 8

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For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondents - Kwan Lisa; DPP

[Editor's note: Appeal from Court of Appeal; Criminal Appeal No: B-05-388-2010 (overruled in part).]

Reported by Wan Sharif Ahmad

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JUDGMENT**Ahmad Maarop FCJ:**

- I [1] The judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Apandi Ali FCJ has since resigned, upon his appointment as the Attorney General of Malaysia.

[2] The appellant was charged with the offence of trafficking 2,681g of cannabis on 7 March 2005 at about 9pm at Jalan Bandar Rawang 2, Rawang in the District of Gombak, in the State of Selangor, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). He was tried in the High Court, found guilty, convicted and sentenced to death. His appeal to the Court of Appeal was dismissed. Hence his appeal before us.

[3] The brief facts of the case disclosed substantially by the evidence of SP3 and SP5 are these. In 7 March 2005 at about 4pm, SP3 received information regarding drug activities in Rawang. After a briefing by SP3, SP3 led a police party including SP5 to Jalan Bandar Rawang 2, Rawang. According to SP5 upon arrival at their destination at about 8.30pm, they positioned themselves in the vicinity of the shops there. The area was well lighted by street lights as well as lights from the shops. SP3 and his party took up position in front of a Kentucky Fried Chicken Restaurant (the KFC) while SP5 and his team were positioned in front of a photo shop called Foto Zoom. At about 9pm both SP3 and SP5 testified that they sighted the appellant carrying a Marlboro Classic bag (P10) in his right hand walking alone at Jalan Bandar Rawang 2 and preparing to cross the road towards Foto Zoom. When detective Rosli approached the appellant and introduced himself as a police officer, the appellant appeared shocked and attempted to run away. A scuffle ensued which caused the bag which the appellant was carrying to fall to the ground next to him. The appellant was apprehended and a search was conducted on his person. No illicit items were recovered from him. SP3 then examined the Marlboro Classic bag (P10) and found a folded off-white towel (P14 (B)) inside the bag. On lifting the towel, SP3 found a package wrapped in newspapers. SP3 unwrapped the package and found three packets of dried leaves bound in transparent plastic, which were believed to be drugs. The appellant together with the packets of dried leaves were taken to Pejabat Narkotik, IPD Rawang. The chemist certified the three plastic packets of dried leaves to contain 2,681g of cannabis, a dangerous drug under the Act. At the close of the prosecution's case, the learned judge of the High Court found that the prosecution had proven a *prima facie* case against the appellant and called upon him to enter his defence. The appellant elected to give evidence on oath and called SD2 to testify for the defence.

[4] In his defence, the appellant gave a different version of the events leading to his arrest. The appellant said that on 7 March 2005 at about 9pm, he had gone to Rawang to meet a friend named Agam. Agam was jobless and the appellant wanted to take Agam to see his boss (Hussin) about a job. The appellant went to Rawang in a car driven by another friend of his named Ibrahim. When they reached Rawang, Ibrahim parked the car in front of a shop called Foto Zoom. The appellant called Agam. Agam informed the appellant that he had arrived in Rawang earlier and had just finished eating at the KFC. The appellant agreed to meet Agam at the entrance of a Pizza Hut Restaurant, nearby. Then the appellant alighted from the car, leaving Ibrahim waiting in the parked car. The appellant claimed that while walking

A towards the Pizza Hut, three men rushed towards him and grabbed and handcuffed him. He was beaten and pushed to the ground. The appellant said he did not even try to struggle as his assailants were too strong. He was then taken to Ibrahim's car where he was told to squat by the side of the road. By that time Ibrahim was no longer in the car. The police examined the car and showed to the appellant a Marlboro bag which was recovered from the foot rest on the left side of the back passenger seat. The appellant said he informed the police that it was Ibrahim who had driven him to Rawang and that the bag probably belonged to Ibrahim or Hussin. The appellant claimed that he was not aware of the presence of the bag or the cannabis found in the bag.

C [5] In his oral submission before us, learned counsel for the appellant told us that the appellant was relying only on one main ground (as stated in para. 4(a) p. 4 of the skeletal submission of the appellant) ie, the learned trial judge had misdirected herself when she failed to consider whether the appellant's case was not a case of passive possession as opposed to presumed trafficking.

D Learned counsel contended that this was a fit and proper case for an offence of possession under s. 6 of the DDA read with s. 39A(2) of the Act. Elaborating on his submission, learned counsel referred to the following last four lines in the second paragraph in the ground of judgment of the learned High Court Judge at p. 270 of the appeal records:

E While SP3's testimony that the second accused looked shocked and attempted to run away without more cannot be taken to point undoubtedly to guilty knowledge on his part. *Parlan Dadeh v. PP* [2009] 1 CLJ 717.

F Learned counsel then submitted that in other words, the learned trial judge discounted the conduct of the appellant in arriving at the finding of knowledge on the part of the appellant.

G [6] Learned counsel next referred to the third paragraph in the grounds of judgment of the learned trial judge which appears at p. 270 of the appeal record:

H However, there were other circumstances from which knowledge that the contents of the bag contained drugs could be inferred. The drugs were in a paper bag under a folded towel which bag the accused was carrying in his right hand. The readily accessible position of the drugs means that there is every opportunity for the accused to simply lift up the towel to see the packets of drugs under it. Little effort was required to lift the towel and unwrap the newspaper wrapping to uncover the drugs. Other than the towel, there were no other items in the bag. I therefore find there is sufficient evidence to infer that the first accused had *mens rea* knowledge of the nature of the contents of the paper bag. Since the accused has been found to have custody and control of the said drugs, as well as *mens rea*

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knowledge, *prima facie* the accused had possession of the drugs independent of the statutory presumption under section 37(d) of the Act. (*PP v. Abdul Rahman Akif* [2007] 4 CLJ 337.)

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[7] Learned counsel contended that it was on that basis (ie, “every opportunity to inspect packets of drug in the bag and little effort required to lift the towel covering the packets of the drug”) alone that the learned trial judge found *mens rea* knowledge. Learned counsel submitted that in doing so the learned trial judge was in error. He submitted that the law does not require the appellant to inspect the bag unless there are suspicious circumstances which compel the appellant to do so. Citing an example, he argued that if a friend of his asked him to carry a bag to a car, he was not obliged to inspect the content of the bag. In the case before the court, the prosecution did not adduce any evidence to establish those suspicious circumstances. In support of his submission, learned counsel also relied on *PP v. Tan Tatt Eek* [2005] 4 CLJ 460; [2005] 6 AMR 543.

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[8] The thrust of the learned Deputy Public Prosecutor’s (Deputy) submission in reply is that the relevant passages in the judgment of the learned trial judge referred to by learned counsel must be considered in entirety and not in isolation. She contended that the learned trial judge was correct when she made use of the evidence of the conduct of the appellant, and the manner the drugs were packed in the bag to make inference of knowledge. In this regard, she referred to para. 35 of the judgment of the Court of Appeal where the court said:

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The appellant in the instant appeal struggled with the police. He was shocked and attempted to flee. During the struggle, the bag fell to the ground. Together with other factors as to the manner in which the drugs were packed and kept in the bag, the learned trial judge had rightly inferred and came to the conclusion that the appellant had knowledge of the same and thus possession was proven.

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[9] The learned Deputy urged us to use the inherent jurisdiction of the court to consider the whole of the evidence, of which she contended, had established that the appellant was caught red-handed trafficking in dangerous drugs.

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Our Decision

[10] The learned trial judge found a *prima facie* case of trafficking against the appellant on the basis of presumed trafficking under s. 37(da) of the DDA, as the evidence before her established that the weight of the proscribed drugs namely cannabis in this case, was 2,681g which was in excess of the statutory minimum of 200g. Before the presumption of trafficking under s. 37(da) is invoked, the learned judge must make an affirmative finding of possession based on the evidence. She cannot make use of s. 37(d) of the Act (See *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273). On the evidence before her, she had no difficulty in finding that the appellant had

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A custody and control of the three packets containing the proscribed drugs. But
mere custody and control are not sufficient to prove possession under the
DDA. The appellant must be proven to have knowledge of the drugs. In this
regard in the leading case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337,
Arifin Zakaria FCJ (as His Lordship then was) delivering the judgment of this
court said at pp. 347-349:

B The incontrovertible facts as found by the trial court was that the
3 packages were found in the car driven by the respondent. He was the
only person in the car at the material time. One package was found under
the driver's seat and two packages under passenger's seat. PW8 gave
evidence that the car was in the possession of the respondent for more
than seven months prior to his arrest. In the circumstances we think the
trial judge was right to hold that at the material time the 3 packages were
in the custody and control of the respondent. Indeed the Court of Appeal
agreed with the trial judge. *But mere custody and control is not sufficient to
establish possession for the purpose of the Act. There has to be established knowledge
of such drug by the respondent.* In *Chan Pean Leon v. Public Prosecutor* [1956] 1
D LNS 17; [1956] 22 MLJ 237 Thomson J dealt with the issue of possession
under the Common Gaming Houses Ordinance 1953 and at p. 239 he
observed:

E "Possession" itself as regards the criminal law is described as
follows in *Stephen's Digest* (9th Edition, page 304):

A moveable thing is said to be in the possession of a person
when he is so situated with respect to it that he has the
power to deal with it as owner to the exclusion of all other
persons, and when the circumstances are such that he may
be presumed to intend to do so in case of need.

F To put it otherwise, there is a physical element and a mental
element which must both be present before possession is made
out. The accused must not only be so situated that he can deal
with the thing as if it belonged to him, for example have it in his
pocket or have it lying in front of him on a table. It must also be
shown that he had the intention of dealing with it as if it belonged
to him should he see any occasion to do so, in other words, that
he had some *animus possidendi*. *Intention is a matter of fact which in the
nature of things cannot be proved by direct evidence. It can only be proved
by inference from the surrounding circumstances. Whether these surrounding
circumstances make out such intention is a question of fact in each individual
case.* If a watch is in my pocket then in the absence of anything else
the inference will be clear that I intend to deal with it as if it were
my own and accordingly I am in possession of it. On the other
hand, if it is lying on a table in a room in which I am but which
is also frequently used by other people then the mere fact that I
am in physical proximity to it does not give rise to the inference
that I intend to deal with it as if it belonged to me. There must
be some evidence that I am doing or having done something with
it that shews such an intention. Or it must be clear that the

circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. *The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.*

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[15] And further down on the same page he added:

Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

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[16] It is trite that what constitutes “possession” under s. 37 of the Act is a question of law. (See *Yee Ya Mang v. Public Prosecutor* [1971] 1 LNS 156; [1972] 1 MLJ 120 and *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something. (emphasis added)

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[11] Thus the law is clear and well-settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge (See *Parlan Dadeh v. PP* [2009] 1 CLJ 717, 741, per Augustine Paul FCJ. In *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 Richard Malanjum FCJ (now CJ (Sabah & Sarawak) said at pp. 605-606:

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It should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. This difficulty had been acknowledged in the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237 when Thomson J said this (at p 239):

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Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

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(See also *Wong Nam Loi v. PP* [1998] 1 CLJ 37). (emphasis added).

[12] The crucial issue which lies at the heart of this appeal is whether the appellant had knowledge of the drugs in the Marlboro bag. This brings us to certain passages in the judgment of the learned trial judge which became the focus of learned counsel’s complaint as well as the submission by the learned Deputy. Indeed the effect of these passages appearing on pp. 269-271 of the appeal record, which we set out in full below, is pivotal to the outcome of this appeal:

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A *Mens Rea*

Knowledge (*Mens rea* possession)

In *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585, Lim Beng Choon J approved of the definition of knowledge in *Saad bin Ibrahim v. PP* [1968] 1 MLJ at p. 159 thus:

B ... Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raised no presumption of *mens rea*.

C The element of knowledge cannot be proved by direct evidence but is to be inferred from the surrounding circumstances. (*Chan Pean Leon v. PP* [1956] MLJ 237). From the evidence of SP3, on being apprehended, the accused had looked shocked and attempted to run away, resulting in a scuffle. The paper bag the accused was holding had fallen proximate to the accused. *While SP3's testimony that the second accused looked shocked and attempted to run away without more cannot be taken to point undoubtedly to guilty knowledge on his part. Parlan Dadeh v. PP* [2009] 1 CLJ 717.

D *However, there were other circumstances from which knowledge that the contents of the bag contained drugs could be inferred. The drugs were in a paper bag under a folded towel which bag the accused was carrying in his right hand. The readily accessible position of the drugs means that there is every opportunity for the accused to simply lift up the towel to see the packets of drugs under it. Little effort was required to lift the towel and unwrap the newspaper wrapping to uncover the drugs. Other than the towel, there were no other items in the bag. I therefore find there is sufficient evidence to infer that the first accused had mens rea knowledge of the nature of the contents of the paper bag. Since the accused has been found to have custody and control of the drugs, as well as mens rea knowledge, prima facie the accused had possession of the drugs independent of the statutory presumption under section 37(d) of the Act. (PP v. Abdul Rahman Akif* [2007] 4 CLJ 337.)

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G As for the offence of trafficking, since the amount of cannabis-2681 gram is far in excess of 200 gram, the statutory presumption of trafficking under section 37 (da) of the Act can be invoked. I therefore find that a *prima facie* case of trafficking has been established against the accused. I therefore ordered the accused to enter his defence.

H [13] Evidence of conduct may become material evidence from which inference of knowledge can be made by the court. The law relating to conduct which is admissible under s. 8 of the Evidence Act 1950, was explained at length by this court in *Parlan Dadeh v. PP* (*supra*) where Augustine Paul FCJ speaking for this court said:

I [28] Evidence of conduct is admissible under s. 8 of the Evidence Act 1950 ("s. 8") which reads as follows:

- (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and *the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.*

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[29] *Illustration (i) to s. 8* reads as follows:

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A is accused of a crime.

The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

C

[30] In commenting on the admissibility of evidence of conduct under s. 8 *Sarkar on Evidence* 15th edn says at p. 175:

The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or *the conduct of the complainant, is relevant; but the condition precedent to its admissibility as 'conduct' is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances.* It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.

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And at p 194:

What is meant by the words, if such conduct influences or is influenced by any fact in issue or relevant fact, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct.

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...

[32] Evidence of conduct admissible under s. 8 may be explained as provided in s. 9 of the *Evidence Act 1950* ("s. 9") which reads as follows:

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Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

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[33] *Illustration (c) to s. 9* reads as follows:

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A is accused of a crime.

The fact that soon after the commission of the crime A absconded from his house is relevant under section 8 as conduct subsequent to and affected by facts in issue.

- A The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly.
- The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.
- B [35] The applicability of the two sections was considered in *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705 where the High Court said at pp 721-722:
- C I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible *under s. 8 of the Evidence Act 1950*. A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v. State* [1996] Cri LJ 2201). *Such conduct must be considered in the totality of the evidence adduced (see Mansor bin Mohd Rashid's case).*
- D *For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in Chan Kwok Keung & Anor v. The Queen* [1990] 3 CLJ 386 (Rep); [1990] 1 CLJ 411 at p 413:
- E It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence
- F In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a nexus between the conduct of the accused, his flight or concealment and the offence in question ...
- G Evidence of such conduct can be explained away by the accused as provided by *s. 9 of the Evidence Act 1950* (see *Ling Ngan Liong v. PP* [1964] MLJ 20; *Choo Chang Teik & Anor v. PP* [1991] 1 CLJ 54 (Rep); [1991] 3 CLJ 2387; [1991] 3 MLJ 423). However, the onus is on the accused to explain his conduct. Thus in *Mansor bin Mohd Rashid's case*, the Federal Court held that the intention of the accused persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v. R* AIR [1941] Orissa 517). (emphasis added).
- H [14] His Lordship then said:
- I The law relating to evidence of conduct is thus patent. *If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of*

s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v. Stephenson* [1904] 68 JP 524). (emphasis added).

[15] His Lordship then referred to *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 and *DPP v. Brooks* [1974] 2 All ER 840 both of which are the oft-cited authorities on the evidence of conduct. His Lordship explained the rationale of the court in explaining away the conduct of the accused in running away in *Abdullah Zawawi Yusoff v. PP*, and the reason why in *DPP v. Brooks* the conduct of running away from the van was held against the accused:

It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *DPP v. Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s. 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 is therefore authority only to this extent. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s. 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s. 9. (emphasis added.)

In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his

- A reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. (emphasis added).
- B [16] It is therefore, essential for the trial judge to come to a finding whether the conduct relied upon to establish knowledge is influenced by or is relevant to a fact in issue under s. 8 of the Evidence Act as explained in *Parlan Dadeh (supra)*. It is for the trial judge to make a finding whether the conduct of running away (to give a simple typical example), is caused by the fact that
- C the accused is caught having in his custody and control of the proscribed drugs. In other words, reverting to the present case, the learned trial judge must be convinced that the evidence adduced by the prosecution established the nexus between the conduct of the appellant and the three packets of drugs in his custody and control. It goes without saying that she must before that
- D make a finding whether the conduct relied upon by the prosecution (ie, looking shocked and attempting to run away) had been proven to her satisfaction on the evidence. In this case, there is nothing to show that the learned trial judge had dealt with the evidence of the conduct relied upon by the prosecution in the way explained earlier. It appears to us that she was not satisfied that the evidence of conduct led to the inevitable inference of
- E guilty knowledge on the part of the appellant. We agree with learned counsel for the appellant that the learned trial judge had discounted the evidence of conduct of looking shocked and attempting to run away. The learned trial judge then referred to other circumstances to infer knowledge. We have said that inference of knowledge can be made from proved facts and
- F circumstances (see *Emmanuel Yaw Teiku v. PP (supra)*). The learned trial judge had said that the drugs were in a paper bag under a folded towel which the appellant was carrying. These are the basic facts upon which her opinion on accessibility of the drugs to the appellant and his opportunity to inspect appeared to have been made. But those basic facts are not quite accurate
- G because the drugs were not just under the towel. The proven facts are that under the towel was a package wrapped with newspaper, and after the package was unwrapped, SP3 found three packets of dried leaves of cannabis bound in transparent plastic. Accessibility and opportunity to inspect are the learned trial judge's opinion. So is her remark about little effort being required. In our view, accessibility and opportunity to inspect may be a very
- H material consideration in the determination of the physical element of custody and control. When someone is caught carrying a bag containing package of dangerous drugs, the element of accessibility to the thing and the opportunity to inspect is invariably established because of his proximity to the bag and the packages. However, in the absence of additional evidence,
- I for example of him taking a peek at the drugs, it does not necessarily mean that he must have knowledge of the drugs, unless there is a presumption in the law to warrant knowledge to be presumed, and indeed in our view, this

is where the presumption under s. 37(d) of the Act may be called into play to presume knowledge of the nature of the thing in the bag. In our view, in the circumstances of this case, accessibility and opportunity to inspect alone are not sufficient to inevitably lead to the inference of knowledge on the part of the appellant. We therefore find that with the evidence of conduct being ruled out by the learned trial judge, there was insufficient factual matrix for her to make the inference of knowledge on the part of the appellant. On the proven facts and circumstances of this case, the prosecution has only proven that the appellant had custody and control of the bag and package containing the proscribed drugs, activating the presumption of possession and knowledge of the nature of the dangerous drugs under s. 37(d) of the Act. Since s. 37(d) has been invoked, s. 37(da) could no longer be relied upon to prove trafficking. The learned trial judge could only have called upon the appellant to enter his defence for an offence of possession of the drugs under s. 6 and punishable under s. 39A(2) of the Act. We have considered the defence of the appellant which we have set out earlier. On the evidence, we have no hesitation in concluding that the appellant has not, on the balance of probability rebutted the presumption that he had possession of the dangerous drugs. In the result, we set aside the conviction on the trafficking charge, and substitute it with a conviction for an offence of possession of dangerous drugs under s. 6 punishable under s. 39A(2) of the Act. The appellant's appeal is thus allowed to that extent.

[17] After considering the mitigation submitted by learned counsel for the appellant and the submission on sentence by the learned Deputy, we sentenced the appellant to imprisonment for a term of 20 years with effect from the date of his arrest and ten strokes of whipping.

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